Supreme Court, U.S.
FILED

0210 19 DEC 23 2002

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

STATE OF ARIZONA,
PETITIONER,

-vs-

RODNEY JOSEPH GANT,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED FOR REVIEW

When police arrest the recent occupant of a vehicle outside the vehicle, are they precluded from searching the vehicle pursuant to *New York v. Belton* unless the arrestee was actually or constructively aware of the police before getting out of the vehicle?

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PETITION FOR WRIT OF CERTIORARI

The State of Arizona respectfully petitions for a writ of certiorari to review the Arizona Court of Appeals' March 29, 2002 opinion. limiting the scope of *New York v. Belton*, in cases of recent occupancy, to situations in which the police initiated or attempted to initiate contact before the suspect exited the vehicle.

OPINION BELOW

The Court of Appeals' opinion is reported as *State v. Gant*, 202 Ariz. 240, 43 P.3d 188 (App. 2002). Appendix ("App.") A. The Arizona Supreme Court's order denying review without comment is not reported. App. B.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals, Division Two, entered the judgment from which relief is sought on March 29, 2002. App. A. The Arizona Supreme Court issued its order denying review on September 26, 2002. App. B. Petitioner timely filed this petition for writ of certiorari within ninety days of the order denying review. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution, which provides in pertinent part:

> Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Arizona courts, along with many other state and federal jurisdictions, have misconstrued *New York v. Belton*, 453 U.S. 454 (1981), by imposing an unwarranted subjective prerequisite: that the police may not search a recent occupant's vehicle incident to his arrest unless the suspect was actually or constructively aware of the police before getting out of the vehicle. Injecting an "awareness" element and an "attempt to contact before exit" requirement results in an unworkable rule that unduly limits *Belton* and conflicts with the decisions of numerous state and federal circuits. To prevent the present confusion about *Belton* from hindering the police as they attempt to do their duty in a safe and consistent fashion, this Court should grant certiorari, resolve the conflict among the various state and federal courts, and reverse the Arizona Court of Appeals' decision.

A. MATERIAL FACTS.

Police officers, aware of an outstanding warrant for Gant's arrest, watched Gant drive his car into a residential driveway and stop. *Gant*, 43 P.3d at 190, ¶ 3. An officer walked toward Gant's car and shined a flashlight in the window, recognizing Gant's face from a previous contact. *Id.* While the officer was walking toward the car, Gant got out of the vehicle and started walking toward the officer. *Id.* The officer called Gant by name, and Gant acknowledged his identity. *Id.* The officer immediately arrested Gant on the warrant. *Id.* The officers secured Gant in a patrol car and began a search of the passenger compartment of Gant's vehicle, where they found contraband that gave rise to charges of unlawful possession of cocaine for sale and unlawful possession of drug paraphernalia. *Id.* at 191, ¶¶ 1, 3.

B. PROCEEDINGS BELOW.

The trial court denied Gant's motion to suppress the contraband, holding that the police had conducted a lawful search incident to Gant's arrest. *Gant*, 43 P.3d at 191, ¶ 5. On review of Gant's conviction, the Arizona Court of Appeals determined that Gant "voluntarily—that is, not in response to police direction—stopped his vehicle, got out, exited it, and began to walk away from it." *Id.* at 192, ¶ 9. The court held that the record did not evince any attempt by the police to initiate contact while Gant was in the vehicle, or indicate that Gant had attempted to evade contact, or show that Gant was aware of the police before alighting.[1] *Id.* at 193, ¶ 13.

On those facts, the court of appeals held that the trial court had erred in refusing to suppress the evidence, because *Belton*, "[b]y its own terms, ... applies only when 'the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation . . . while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile).'" *Gant*, at 192, ¶ 11 (quoting *United States v. Hudgins*, 52 F.3d 115, 119 (6th Cir. 1995)). The *Gant* court premised its holding entirely on Fourth Amendment law.

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1. This Court rarely grants certiorari to resolve factual issues, and it need not resolve any here. *See* Rule 10, Rules of the Supreme Court. The operative facts are not in dispute. Although the Arizona Court of Appeals characterized the trial court record as insufficient to meet the State's burden of proving the constitutionality of the warrantless search, the alleged deficiency related solely to the subjective factors that the *Gant* court held dispositive—factors that Petitioner contends are irrelevant: whether Gant was aware of the police before alighting and whether the police attempted to make contact before Gant exited the vehicle. The objective facts necessary to this Court's review—Gant's recent occupancy of the vehicle, his immediate valid arrest in the near vicinity of the vehicle, and the contemporaneous nature of the search—were not in dispute below, and the trial court record fully supports them.

Petitioner sought discretionary review by the Arizona Supreme Court, contending, inter alia, that this Court had announced a straightforward, objective rule in *Belton*: the arrestee's occupancy *or recent occupancy* of the vehicle at the time of arrest justifies, without more, a search of the vehicle's passenger compartment incident to the arrest. Petitioner argued that the court of appeals' analysis had injected unwarranted subjectivity by conditioning the application of *Belton* on the suspect's and the police officers' states of mind. Petitioner urged Arizona's highest court to hold that it is irrelevant under *Belton* (1) whether the suspect is aware of the police before alighting and (2) irrelevant whether the police initiate contact, or attempt to do so, before the suspect exits the vehicle. The Arizona Supreme Court denied review without comment, thereby allowing the court of appeals' published opinion to stand.

REASONS TO GRANT THE PETITION

A. SUMMARY OF THE ARGUMENT.

Under *New York v. Belton*, it is irrelevant (1) whether a recent occupant was aware of the police before alighting from the vehicle, and (2) whether the police initiated contact, or attempted to do so, before the suspect exited the vehicle. All that *Belton* requires is that the arrestee be a recent occupant of the vehicle and that the search of the vehicle is conducted incident to the suspect's valid arrest.

The Arizona Court of Appeals erred by holding in *State v. Gant* that *Belton* is inapplicable absent evidence of the suspect's actual or constructive awareness of the police before getting out of the vehicle. The decision below acknowledges and epitomizes a nationwide split of authority concerning this issue among various federal and state jurisdictions. This Court should grant certiorari, resolve the conflict, and reverse the *Gant* decision.[2]

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2. This Court has recently shown interest in resolving this issue. Two years ago the Court granted a petition for writ of certiorari in *Florida v. Thomas*, 532 U.S. 774 (2001) which raised the same issue. After hearing oral argument, the Court dismissed the matter for lack of subject matter jurisdiction. *Id.* at 775. The instant case lacks the jurisdictional defect that prevented this Court's review of the Florida case. The Arizona Court of Appeals expressly held that the warrantless search of Gant's vehicle did not satisfy the requirements of *Chimel v. California*, 395 U.S. 752 (1969) (warrantless search incident to arrest of suspect inside a dwelling was unconstitutional to the extent it exceeded the "area from within which he might gain possession of a weapon or destructible evidence"). *Gant*, 43 P.3d at 195, ¶ 15. The *Gant* court also found that the officers lacked probable cause to search the vehicle. *Id.* at ¶ 17.

B. ARGUMENT: THE *GANT* COURT ERRED IN DETERMINING THAT BELTON DOES NOT APPLY WHEN THE INITIAL POLICE CONTACT OCCURS AFTER THE SUSPECT HAS EXITED THE VEHICLE OF HIS OWN ACCORD.

In *Belton*, this Court determined that, "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460. Thus, the arrest itself is the triggering mechanism of a vehicle search incident to the arrest, not whether the police initiated or attempted to initiate contact before the suspect alighted from the vehicle. *See United States v. Robinson*, 414 U.S. 218, 235 (1973) ("It is the fact of the lawful arrest which establishes the authority to search."). *Belton* established an objective bright-line rule that should be applied in a simple and straightforward fashion, regardless of the suspect's actual or constructive state of mind before getting out of the car. *See Belton*, 453 U.S. 458–59 (seeking to articulate a "straightforward rule, easily applied, and predictably enforced").

In *Gant*, the Arizona Court of Appeals determined that *Belton* is inapplicable unless the suspect was actually or constructively aware of the police before getting out of the vehicle. Specifically, the court held that *Belton* "applies only when 'the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation . . . while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile).'" *Gant*, 43 P.3d at 192, ¶ 11 (quoting *Hudgins*, 52 F.3d at 119).

The *Gant* court erred in determining that *Belton* does not apply when the initial police contact occurs after the suspect has exited the vehicle of his own accord. In reaching that conclusion, the court unjustifiably adopted a rationale contrary to *Belton*'s reasoning and purpose, thereby blurring the bright-line rule beyond any predictable, consistent applicability.

1. State and federal courts nationwide have issued conflicting decisions on this question.

a. Conflicting decisions in the federal jurisdictions.

The *Gant* court relied heavily on *Hudgins*. In *Hudgins* the court held:

> [W]here the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fit within *Belton's* bright-line rule, and a case-by-case analysis of the reasonableness of the search under *Chimel* becomes necessary.

52 F.3d at 119. But *Hudgins* conflicts with decisions in several federal circuits that have rendered less restrictive interpretations of *Belton*.

In *United States v. Snook*, 88 F.3d 605 (8th Cir. 1996), the court affirmed the search of the arrestee's automobile under *Belton*. Upholding the search incident to arrest, the court wrote: "The fact that Snook had just stepped out of his vehicle as the officer arrived and before his arrest does not alter his status as an 'occupant' of the vehicle." 88 F.3d at 608. As in the present case, the defense had argued that *Belton* did not apply because the suspect had just stepped out of the car and was therefore not an occupant at the time of his arrest. The court explicitly rejected this argument and determined that although Snook had stepped out of the vehicle of his own accord, he was an occupant for purposes of *Belton*.

In *United States v. Franco*, 981 F.2d 470 (10th Cir. 1992), the court upheld a search incident to arrest under similar circumstances. "Such a search is permissible notwithstanding the fact that the arrestee is out of the automobile and under the control of the officer. Mr. Franco was a recent occupant of his vehicle and the arrest was made in close proximity to his vehicle." 981 F.2d at 473 (quotation marks omitted). Reviewing the policy considerations underlying *Belton*, the court further determined that "the law simply does not require the

arresting officer to mentally sift through all these possibilities during an arrest, before deciding whether he may lawfully search within the vehicle." *Id.* (quotation marks omitted).

In *United States v. Arango*, 879 F.2d 1501 (7th Cir. 1989), the defense argued that the search incident to arrest was invalid because the defendant, who had attempted to flee on foot, was approximately a block from the vehicle when apprehended. The court rejected this argument and held that the search was consistent with *Belton*. The court determined that the law:

> "does not require the arresting officer to undergo a detailed analysis, at the time of arrest, of whether the arrestee, handcuffed or not, could reach into the car to seize some item within, either as a weapon or to destroy evidence, or for some altogether different reason. The facts surrounding each arrest are unique, and it is not by any means inconceivable under those various possibilities that an arrestee could gain control of some item within the automobile."

Arango, 879 F.2d at 1506-07 (quoting *United States v. Cotton*, 751 F.2d 1146, 1148 (10th Cir. 1985).

Similarly, to require a police officer in the field to make instantaneous determinations regarding the suspect's motivation for exiting the vehicle undermines the policy underlying *Belton* and does not further "the Court's preference for a straightforward rule for guidance of police officers and avoidance of hindsight determinations in litigation." *See United States v. Karlin*, 852 F.2d 968, 971 (7th Cir. 1988).

In *United States v. Abel*, 707 F.2d 1013 (9th Cir. 1983),[3] the court affirmed the vehicle search under *Belton* because of the arrestee's spatio-temporal association with the vehicle. The police first contacted the suspect after they had seen him exit his vehicle and walk toward a house, and the suspect apparently was unaware of the police

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3. *Overruled on other grounds by United States v. Abel*, 469 U.S. 45, 56 (1984).

until they detained and arrested him in front of the house. 707 F.2d at 1015.

In *United States v. Willis*, 37 F.3d 313 (7th Cir. 1994), the police had seen the suspect in the car but first contacted him while he squatted furtively outside the car, where he claimed merely to be "changing a tire." 37 F.3d at 315. The court concluded that Willis was an occupant for *Belton* purposes. 37 F.3d at 317.

Another panel of the Seventh Circuit has suggested that where evidence of actual occupancy is lacking, a suspect's "positive link" with the vehicle may be sufficient to uphold a vehicle search contemporaneous with the suspect's arrest. *See United States v. Adams*, 26 F.3d 702 (7th Cir. 1994) (because the suspect was neither an occupant of the searched vehicle nor positively linked to it prior to his arrest, the search did not fall within the scope of *Belton*).

The split among the federal circuits is apparent when comparing the foregoing decisions with *Hudgins* and with *United States v. Strahan*, 984 F.2d 155 (6th Cir. 1993), also cited in *Gant*. In *Strahan*, the court determined that Strahan was approximately thirty feet from his vehicle when arrested. 984 F.2d at 159. The court held that Strahan was not an occupant of the vehicle and that *Chimel*, not *Belton*, governed. *Id.* Similarly, in *United States v. Fafowora*, 865 F.2d 360 (D.C. Cir. 1989), also cited in *Gant*, the court held the search incident to arrest improper because the suspects had been walking away from their jeep and the contact had occurred well outside of the vehicle. 865 F.2d at 362. The court reasoned that where the police come upon an arrestee outside of an automobile, no bright-line rule is required. *Id.* Instead, the court held that the *Chimel*, "area of control" analysis applies. *Id.*

The opinion in *United States v. Tobon-Sierra*, 954 F. Supp. 73 (S.D. N.Y. 1997), acknowledged the conflict within the federal system. The district court noted that several circuits have approved the search of a vehicle under *Belton* when the suspect was a recent occupant and was arrested near the car. 954 F. Supp. at 76. Those circuits did not require any finding that the approach of law enforcement agents had motivated the suspect to leave the vehicle. *Id.* The district court distinguished the cases cited by the defense in *Tobon-Sierra* that depended upon a contact initiated by police, but

ultimately declined to reach the issue because the defendant had exited the vehicle in response to police contact. 954 F. Supp. at 77.

b. Conflicting decisions in the state jurisdictions.

A review of state appellate court decisions reveals a wide split of authority there as well. Some jurisdictions have held, as in *Gant*, that an arrestee is a "recent occupant" of a vehicle only where a law enforcement officer initiates contact while the suspect is inside the vehicle. *See, e.g., Thomas v. State*, 761 So. 2d 1010, 1014 (Fla. 1999);[4] *State v. Foster*, 905 P.2d 1032, 1038–39 (Idaho App. 1995); *Gibson v. State,* 733 N.E.2d 945, 955 (Ind. App. 2000); *Commonwealth v. Santiago*, 575 N.E.2d 350, 353–54 (Mass. 1991); *People v. Fernengel*, 549 N.W.2d 361, 363 (Mich. 1996).

Other states have determined that a recent occupant of a vehicle is an occupant for *Belton* purposes whether or not a law enforcement officer initiates contact while the suspect is in the vehicle. *See, e.g., State v. McLendon*, 490 So. 2d 1308, 1309 (Fla. App. 1986); *People v. Bosnak*, 633 N.E.2d 1322, 1326–27 (Ill. App. 1994); *Glasco v. Commonwealth*, 513 S.E.2d 137, 141–42 (Va. 1999); *State v. Stroud*, 720 P.2d 436, 439 (Wash. 1986); *State v. Fore*, 783 P.2d 626, 631–32 (Wash. App. 1989).

In *Fore*, for example, the court noted that the two suspects, who were standing some distance from the vehicle when they were arrested, had been "occupants of the moving vehicle just a few minutes prior to the arrest" and were "sufficiently close [to the vehicle] to be immediately visible to the arriving officers." 783 P.2d at 631. The court saw no need to "explore the outer boundaries of a permissible vehicle search incident to an arrest" because the search was "sufficiently proximate, both temporally and physically, to the arrest." *Id.*; *see also McLendon*, 490 So. 2d at 1309 (suspect, unaware of police until an undercover officer arrested him inside a service station, twenty to thirty feet away from the vehicle, was an

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4. This was the case that prompted this Court's grant of certiorari in *Florida v. Thomas*, 532 U.S. 774 (2001).

"occupant" for *Belton* purposes). This view is consistent with the reasoning of *Belton* and is in conflict with the view that the *Gant* court adopted.

2. *This Court should resolve the conflict among the state and federal courts by making clear that* Belton *requires only recent occupancy, determined by the arrestee's spatio-temporal proximity to the vehicle, without regard to the arrestee's state of mind.*

The legality of a vehicle search incident to a recent occupant's valid arrest should not turn on whether the suspect was actually or constructively aware of the police before he exited the vehicle. The *Gant* approach creates the very problems for police and courts that *Belton* sought to avoid. For example, any "awareness of the police" test is antithetical to undercover police work. The whole idea of undercover law enforcement activity, particularly arrests effected by undercover officers, is to avoid announcing the presence of the police before apprehending the offender. *See McLendon*, 490 So. 2d at 139 (*Belton* search upheld where undercover officer did not announce his presence until it was safe to arrest murder suspect inside a building, twenty or thirty feet from the door of the suspect's car). It would not be in the public's interest to force undercover officers to elect whether to announce their identity prematurely to comply with *Gant*'s pre-exit contact rule or to forego a *Belton* search by remaining incognito until they can physically detain the suspect after he exits the vehicle.[5]

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5. Another disadvantage inherent in a contact-before-exit rule is that it encourages risky behavior by police officers and suspects alike. For the police it poses a dilemma: should the officer calmly approach the vehicle and risk foregoing a *Belton* search if the suspect emerges "unaware," or should the officer race toward the vehicle, either on foot or in his own vehicle, and likely escalate the danger to himself and others while trying to "signal confrontation" or prevent the suspect's exit? *See State v. Wanzek*, 598 N.W.2d 811, 815 (N.D. 1999) (to conduct a valid search under *Belton*, police officers should

(continued...)

Even where police officers are in uniform, a rule requiring case-by-case determinations of what prompted the suspect to exit the vehicle is certain to spawn confusion among law enforcement personnel, generate unwarranted mini-trials on subjective factual minutiae, and result in additional inconsistent legal rulings by courts nationwide. In jurisdictions that have espoused the *Gant* rule or a similar rule, trial courts will be burdened with mini-trials on defendants' and police officers' motivations and their actions in furtherance thereof in virtually every instance in which the government relies on *Belton*. Along with the inevitable inconsistent results, there may be substantial additional expenditures of time and resources due to the circumstantial nature of state-of-mind evidence.

Police officers' subjective intentions rarely factor into Fourth Amendment analysis.[6] Police should not be required to memorialize what they intended or attempted to do to get the suspect's attention while he was in the car, but should merely be required to record the timing and location of the arrest in relation to the arrestee's occupancy of the automobile. Moreover, no rule or standard of review should be based upon a criminal defendant's after-the-fact averments about his mental processes. *See State v. Medrano*, 914 P.2d 225, 227

(...continued)
not have to run a footrace to the suspect's vehicle); *State v. Gonzalez*, 487 N.W.2d 567, 572 (Neb. App. 1992) (same). Suspects, in turn, may respond violently to "signal[ed] confrontation" by attempting to escape in the vehicle or by using firearms or other weapons that they might not otherwise have used.

6. *See Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (objective circumstances of traffic stop allow officer to order driver out of car, "subjective thoughts notwithstanding"); *Whren v. United States*, 517 U.S. 806, 811-13 (1996) (Supreme Court is "unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers."); *United States v. Robinson*, 414 U.S. 218, 236 & n.7 (1973) (availability of "search incident to arrest" for officer safety does not depend on the officer's subjective mind set).

(Ariz. 1996) (murder defendant's self-serving testimony about his mental state at the time of the offense was "subject to skepticism").[7]

Fourth Amendment issues are fact-intensive by nature. But in cases where the suspect exits the vehicle before the police establish contact with him, it would be more consistent with the principles that underlie *Belton* to focus on the suspect's spatio-temporal proximity to the vehicle rather than upon his actual or constructive awareness of the police. Unlike questions concerning the suspect's awareness, questions of spatio-temporal proximity to the vehicle at the time of arrest are readily quantifiable in terms of time and distance. The police can objectively record such information at the scene of the arrest, and defendants can challenge it in court with contrary objective evidence.

In issuing *Belton*, this Court intended to articulate "a single, familiar standard" that police officers could quickly and consistently apply to the circumstances that confront them. *Belton*, 453 U.S. at 458 (quotation marks omitted). A workable standard is essential:

> [T]he protection of the Fourth and Fourteenth Amendments can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.

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7. A rule based on a suspect's actual or constructive awareness of the police invites litigation concerning an individual defendant's physical or mental condition, such as vision, hearing, and mental acuity, along with questions about external influences on perception, such as intoxication, weather conditions, lighting, ambient noise, and the physical characteristics of the defendant's vehicle—facts that are irrelevant under a spatio-temporal proximity analysis.

Id. (quotation marks omitted). Only an objective test—occupancy or recent occupancy determined by the suspect's spatio-temporal proximity to the vehicle—can accomplish that.[8]

The Arizona Court of Appeals, with the Arizona Supreme Court's tacit approval, has nullified *Belton*'s objective rule by rendering it dependent upon the suspect's actual or constructive state of mind. Injecting subjective factors of awareness, evasive intent, and "attempt to initiate contact" contravenes the very nature of a bright-line rule. This Court crafted the *Belton* rule, and only this Court can modify its own holdings, notwithstanding the *Gant* court's attempt to do so in Arizona.[9] Application of the *Belton* rule should have no factual predicate other than the lawful arrest of a recent occupant. To treat

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8. Gant's very recent occupancy of his vehicle at the time of his arrest is uncontested and undeniable, which leaves the potential "outer limits" question for another case that might present that issue. *See, e.g. State v. Porter*, 6 P.3d 1245, 1249–50 (Wash. App. 2000) (*Belton* held inapplicable where suspect was arrested while walking his dog 300 feet from the vehicle).

9. Because arrest alone triggers a *Belton* search, this Court's decision in *Knowles v. Iowa*, 525 U.S. 113 (1998). is not inconsistent with Petitioner's prayer for relief. *Knowles* is inapposite because there was no arrest in that case—only the issuance of a traffic citation. This Court determined that two of the concerns supporting a vehicle search incident to an arrest—officer safety and the need to preserve evidence—are either absent altogether or present to a lesser extent in citation situations. 525 U.S. at 118–19. But under *Belton*, those factors are *presumed* present in every custodial arrest situation, obviating case-by-case analysis. *Belton*, 453 U.S. at 461; *Bailey v. State*, 12 P.3d 173, 177 (Wyo. 2000). Thus, where an arrest has been made, factual minutiae concerning who initiated contact with whom or who was aware of whom likewise are irrelevant under *Belton*'s bright-line rule. For *Belton* purposes, a citation (as in *Knowles*) is not the functional equivalent of a custodial arrest, because only a valid arrest can trigger a *Belton* search. *Knowles* did not modify the *Belton* rule but simply declined to extend its application beyond custodial arrests. *Bailey*, 12 P.3d at 177.

the *Belton* rule differently is to destroy the rule's purpose and its "bright-line" nature.

Gant was lawfully arrested on an outstanding warrant. 43 P.3d at 190, ¶ 3. What transpired factually before his valid arrest as a recent occupant of his vehicle is of no moment. The arrest alone triggered application of the *Belton* rule, and the ensuing search of the vehicle incident to that lawful arrest was constitutionally permissible and reasonable. There is no need to inquire whether there was additional authority for the search, such as danger to the officers or a need to preserve evidence. This Court has specifically rejected any need for a case-by-case examination of the reasons supporting a search incident to arrest; the lawful arrest itself is sufficient. *Belton*, 453 U.S. at 459–60, (citing *Robinson*, 414 U.S. at 235).

The Arizona courts, along with many other state and federal jurisdictions, have misconstrued *Belton*. Injecting an "awareness" element and an "attempt to contact before exit" requirement results in an unworkable rule that contravenes *Belton* and conflicts with the decisions of numerous state and federal circuits. To prevent the present confusion about *Belton* from unduly hindering the police and generating unnecessary litigation on factual minutiae, this Court should grant certiorari, resolve the conflict among the various state and federal courts, and reverse the Arizona Court of Appeals' decision.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

43 P.3d 188
202 Ariz. 240

The STATE of Arizona, Appellee,

v.

Rodney Joseph GANT, Appellant.

No. 2 CA–CR 2000–0430.

Court of Appeals of Arizona,
Division 2, Department A.

March 29, 2002

Defendant was convicted in the Superior Court, Pima County, No. CR- 20000042, Clark W. Munger, J., of unlawful possession of cocaine for sale and unlawful possession of drug paraphernalia. Defendant appealed. The Court of Appeals, Brammer, P.J., held that: (1) as a matter of first impression, evidence did not support a finding that the police were attempting to initiate contact with drug defendant while he was in the vehicle either by confronting him or by signaling an intent to confront him, and thus, warrantless search of defendant's vehicle was not lawful as a "contemporaneous incident" of lawful arrest; (2) warrantless search of drug defendant's vehicle was not justified as a search incident to arrest; and (3) automobile exception allowing police to conduct warrantless search of drug defendant's vehicle based on probable cause was inapplicable.

Reversed.

Pelander, J., concurred specially and filed an opinion.

[Headnotes omitted]

Janet Napolitano, Arizona Attorney General, by Randall M. Howe and Eric J. Olsson, Tucson for appellee.

Law Offices of Thomas Jacobs, by Thomas Jacobs, Tucson for appellant.

OPINION

BRAMMER, Presiding Judge.

¶ 1 After a jury trial, appellant Rodney Gant was found guilty of unlawful possession of cocaine for sale and unlawful possession of drug paraphernalia. The trial court sentenced him to concurrent, mitigated prison terms, the longest of which was three years. Because we agree with Gant that the trial court erred in denying his motion to suppress evidence, we reverse his convictions.

Standard of Review and Background

¶ 2 Gant argues that the trial court erred in denying his motion to suppress a handgun and a plastic bag of cocaine found when his vehicle was searched after his arrest, asserting that the warrantless search violated his Fourth Amendment rights. When reviewing a trial court's ruling on a motion to suppress evidence based on an alleged Fourth Amendment violation, we defer to the court's factual findings but review de novo mixed questions of law and fact. *State v. Wyman,* 197 Ariz. 10, 3 P.3d 392 (App.2000). Because warrantless searches are presumptively unreasonable and unconstitutional under the Fourth Amendment, the state bears the burden of proving the lawfulness of the acquisition of evidence seized without a warrant. *Rodriguez v. Arellano,* 194 Ariz. 211, 979 P.2d 539 (App.1999); *see also State v. Valle,* 196 Ariz. 324, 996 P.2d 125 (App.2000). In determining whether the state has carried that burden, we consider only the evidence presented at the suppression hearing. *See State v. Sanchez,* 200 Ariz. 163, 24 P.3d 610 (App.2001). And, we view that evidence in the light most favorable to sustaining the trial court's ruling. *Id.*

¶ 3 At the hearing on Gant's motion to suppress, the court stated:

> Are any of the facts in issue? It seemed to me that from your respective briefs, that there didn't seem to be any disagreement. As I understand the facts—and let me repeat what I understand they are: That this arose out of a report of possible narcotic activity; . . . police went to the residence, knocked on the door. The defendant answered. . . .
>
> . . . .
>
> . . . [The police] ran a computer check on Rodney Joseph Gant and found that he was wanted on a suspended driver's license and, also, an outstanding warrant for failure to appear.
>
> . . . .
>
> . . . [The police] left and then came back to the residence, found a man and a woman around the residence. The woman had a crack pipe. The man, they didn't apparently find any contraband on him. Then the defendant arrived, driving a vehicle, and the officer, as the car pulled into the driveway, shined his flashlight into the car, recognized Mr. Gant as the individual he had previously met at the door and identified him as Mr. Gant.

> And as the officer was walking toward the vehicle, Mr. Gant got out of the vehicle and started walking toward the officer when the officer called him by name, and he responded that that was who he was. And the officer took him in custody for the outstanding warrant and suspended driver's license, having seen him operating a motor vehicle. . . . [T]here's no question that [the officer] could legally arrest and did lawfully arrest the defendant on the outstanding warrant and for operating a motor vehicle without a driver's license.
>
> Mr. Gant was removed from the vehicle—from the vicinity of the vehicle to the officer's patrol car and placed in the back of the patrol car, and the officers then did a search of the defendant's vehicle, found a weapon and found the jacket. And, apparently, feeling the jacket, felt something that they felt might be drugs and took it out of the pocket and found cocaine.

¶ 4 Gant's counsel stated that, "if the State concedes those are the facts, I think those are facts sufficient to proceed on the motion." The prosecutor replied: "I have no disagreement with the facts. I'd be happy to submit, also, on my pleading as well." Consequently, the parties did not introduce any evidence at the suppression hearing either in support of or in opposition to Gant's motion.

¶ 5 In his motion to suppress the evidence found in his vehicle, Gant did not contest the lawfulness of his arrest but, rather, argued only that the ensuing warrantless search of his vehicle was illegal because no exceptions to the Fourth Amendment's warrant requirement applied. The state argued that the search was lawful because it had been conducted incident to Gant's arrest or, alternatively, that, because the police had probable cause to search his vehicle, a warrantless search was permissible under the automobile exception to the Fourth Amendment's warrant requirement. The trial court denied Gant's motion, finding that the search of the car was lawful because it was a search incident to his arrest. We disagree.

Warrantless Search Incident to Arrest

¶ 6 In *Chimel v. California,* 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685, 694 (1969), the Supreme Court held that, when police make a lawful arrest, they may, without a warrant, search the person in custody as well as the "area from within which he might gain possession of a weapon or

destructible evidence." Applying that principle to a situation in which the person arrested had been occupying a vehicle when police initiated contact with him, the Court later held that officers may search the entire passenger compartment of a vehicle, and all containers therein, as a "contemporaneous incident" of a lawful arrest. *New York v. Belton,* 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768, 775 (1981).[1] This rule, denominated "bright-line" by one of the dissenting justices, *id.* at 463, 101 S.Ct. at 2866, 69 L.Ed.2d at 777, was premised on the generalization, rather than the probability in a given case, that objects within a vehicle's passenger compartment are within an arrestee's reach. Even so, the Court specifically stated that its holding was limited to the "particular and problematic" context in which it had arisen, and did not "alter[ ] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." 453 U.S. at 460 n. 3, 101 S.Ct. at 2864 n. 3, 69 L.Ed.2d at 775 n. 3; *see also State v. Lopez,* 198 Ariz. 420, 10 P.3d 1207 (App.2000).

¶ 7 Taking *Belton* one step further, the Ninth Circuit Court of Appeals held that a vehicle search conducted five minutes after an arrestee had been removed from both the automobile and the scene qualified as a search incident to arrest under *Belton* because the search had "occurred during a continuous series of events closely connected in time to the arrest." *United States v. McLaughlin,* 170 F.3d 889, 891 (9th Cir.1999); *see also United States v. Doward,* 41 F.3d 789 (1st Cir.1994).

¶ 8 The state contends that the question of whether *Belton* applies to Gant's situation "appears to be a matter of first impression in Arizona."[2] We agree and conclude

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1. In *Belton,* the Court also used the term "recent occupant," which, when read in context, clearly refers to someone who, once arrested and removed from a vehicle, necessarily becomes its "recent occupant." 453 U.S. at 460, 101 S.Ct. at 2864, 69 L.Ed.2d at 775. Some courts have, in our opinion, misconstrued this language to justify extending *Belton's* reach to cases in which a person voluntarily exited a vehicle before the police initiated any contact. *See, e.g., Glasco v. Commonwealth,* 257 Va. 433, 513 S.E.2d 137 (1999).

2. In contrast to that assertion in its brief, at oral argument in this court, the state referred to this as a "run-of-the-mill *Belton* case," citing *State v. Crivellone,* 138 Ariz. 437, 675 P.2d 697 (1983), and *State v. Hanna,* 173 Ariz. 30, 839 P.2d 450 (continued...)

that, not only are *Belton* and *McLaughlin* both factually distinguishable from this case, but also that the rationale underlying those cases does not extend to this situation. We further conclude, therefore, that the warrantless search of Gant's vehicle was not a lawful search incident to his arrest.

¶ 9 In *Belton,* an officer stopped the vehicle in which Belton was a passenger because the officer had seen the vehicle speeding. In *McLaughlin,* an officer stopped the vehicle because it had an illegally tinted rear window. Here, in contrast, the facts as summarized by the trial court do not show, nor can we infer, that Gant was or should have been aware either of the police presence at the residence as he approached it or of the light the officer shined into his vehicle. And if, as the state suggested at oral argument in this court, the trial court implicitly drew either inference, we conclude it erred in doing so because neither inference is reasonably suggested by these facts. What is clear from these facts, however, is that Gant voluntarily—that is, not in response to police direction—stopped his vehicle, exited it, and began to walk away from it. We believe that this factual distinction is significant and requires a different result than that in *Belton* and *McLaughlin.*

¶ 10 We agree with the holding of *United States v. Strahan,* 984 F.2d 155 (6th Cir.1993), in which the Sixth Circuit Court of Appeals determined that *Belton* was inapplicable to a situation in which an arrestee had been apprehended approximately thirty feet from his automobile because the police had not initiated contact with him until that time and, therefore, he was not an occupant of the vehicle. The court instead held that the test outlined in *Chimel* applied. We further agree with the reasoning expressed in *United States v. Fafowora,* 865 F.2d 360 (D.C.Cir.1989), in which the court held inapplicable the rationale underlying *Belton's* bright-line rule allowing police to search the entire passenger compartment of a vehicle—that it is, at least hypothetically, within the reach of its arrested occupant—to a case in which the police had first encountered the arrestee outside the automobile. In such cases, the court said, the twin concerns of officer safety and evidence preservation that justify, at least theoretically, the search-incident-to- arrest exception to the warrant requirement discussed in *Chimel* disappear because the vehicle's passenger compartment is

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(...continued)
(App.1992). *Crivellone and Hanna,* however, both involved situations in which officers stopped a suspect's vehicle, which was not the case here. The state's reliance on these cases, therefore, is misplaced.

not available to the arrestee at the time the police encounter or arrest the person. Other courts have expressed similar reasoning and have reached similar results. *Lewis v. United States*, 632 A.2d 383 (D.C.1993); *Thomas v. State*, 761 So.2d 1010 (Fla.1999); *State v. Foster*, 127 Idaho 723, 905 P.2d 1032 (Ct.App.1995); *People v. Stehman*, 324 Ill.App.3d 54, 257 Ill.Dec. 607, 753 N.E.2d 1233 (2001); *Commonwealth v. Santiago*, 410 Mass. 737, 575 N.E.2d 350 (1991); *People v. Fernengel*, 216 Mich.App. 420, 549 N.W.2d 361 (1996).

¶ 11 By its own terms, *Belton* is limited to the particular factual situation in which it arose. Accordingly, it applies only when "the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation . . . while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile)." *United States v. Hudgins*, 52 F.3d 115, 119 (6th Cir.1995); *see also Thomas*. We believe that "the *Belton* objectives and Fourth Amendment principles are best served by limiting *Belton's* " reach in this way. *Foster*, 905 P.2d at 1039.[3] However, we emphasize that, when police attempt to initiate contact by either confronting or signaling confrontation, a vehicle's occupant cannot avoid *Belton's* application and create a haven for contraband simply by exiting the vehicle when officers are seen or approach. If the record shows that police overtly initiated contact before a suspect exits a vehicle and the suspect is subsequently arrested, the vehicle may nonetheless be searched without a warrant incident to an arrest under *Belton*. *See, e.g., United States v. Mans*, 999 F.2d 966 (6th Cir.1993).

¶ 12 The two cases the state asserts "are not meaningfully distinguishable" from this case, *State v. Wanzek*, 598 N.W.2d 811 (N.D.1999), and *People v. Savedra*, 907 P.2d 596 (Colo.1995), can, in fact, be distinguished on this very

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3. We acknowledge that not all courts agree with this construction of *Belton*. *See, e.g., United States v. Sholola*, 124 F.3d 803, 817 (7th Cir.1997) (extending *Belton* to a case in which the defendant was not an occupant but was " 'positively linked' " to the vehicle at the time of his arrest), *quoting United States v. Adams*, 26 F.3d 702, 705 (7th Cir.1994); *United States v. Snook*, 88 F.3d 605 (8th Cir.1996); *United States v. Schecter*, 717 F.2d 864 (3d Cir.1983); *see also Glasco*.

basis. In *Wanzek*, the arresting officer testified that, when he had pulled up next to the defendant in his patrol car, she had "looked over at [him], looked straight ahead, backed the vehicle up, and exited the vehicle." 598 N.W.2d at 813. And, in *Savedra*, the court stated that, because the defendant had been in his vehicle when he "first saw the police officer approach," it was "not unreasonable to assume that he exited the vehicle to avoid contact with the police officer." 907 P.2d at 599-600.

¶ 13 In contrast, the summarized facts here do not show, nor can we infer, that the police attempted to initiate contact with Gant while he was still in his vehicle or that he had attempted to evade contact with the police by exiting his vehicle. Contrary to the state's assertion, we do not believe that, by shining a flashlight into Gant's vehicle, the officer necessarily initiated contact with him. These facts do not show the distance between Gant's vehicle and the officer, either when he shined the flashlight at Gant's car or when the officer approached it after Gant had exited it, or that a person in Gant's position would even have been aware that a light had been shined into the vehicle, much less who had shined it. Nothing shows or suggests that Gant looked in the direction of the light when it was shined or that he had seen officers or any other sign of police activity at the residence, such as flashing emergency lights, marked police vehicles, or uniformed officers, either when he arrived at the residence or before he exited his vehicle. The record is also silent about the lighting in the areas where Gant parked his vehicle, those places where the officers were positioned when he arrived, and the spaces that separated those areas. Additionally, the record does not support a finding that Gant was or should have been aware of anyone's approach as he exited his vehicle.[4] Furthermore, nothing in the record shows that, by shining the light, the officer was attempting to signal his intent to confront Gant. Rather, the officer might simply have

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4. Citing the following statements the trial court made when denying Gant's motion to suppress, the state asserts that the court made implicit factual findings that Gant had been aware of the police presence at the residence and had been only a few steps away from the officer when contact occurred. The court stated: "I don't think [Gant] can limit the scope of the search by vacating the car faster than the officers can get up to the car," and "[t]he fact that Mr. Gant was fast enough or clever enough to get out of the vehicle I don't think limits the officer's ability to search the vehicle." But, nothing in the trial court's factual summary, nor any reasonable inferences therefrom, supports those remarks.

been attempting to ascertain the identity of the vehicle's occupant as he observed the vehicle approach the residence. Lastly, the record does not reflect the time each of these various events consumed nor the time intervals separating them.

¶ 14 It is unfortunate that the record was not based on witnesses' testimony, under both direct and cross-examination but, rather, on the trial court's apparently extemporaneous summary of the facts as it understood them from the materials contained in Gant's motion to suppress and the state's opposition to it. We believe the better practice is to have the facts flow from witness testimony and other admitted evidence or to be stated in a written stipulation of the parties. Indeed, the law favors a stipulation of facts, especially if the stipulation is carefully considered and crafted in advance of a hearing or trial, that would be binding both below and on appeal. *See State v. Sorrell,* 109 Ariz. 171, 506 P.2d 1065 (1973); *Bennett ex rel. Arizona State Personnel Comm'n v. Beard,* 27 Ariz.App. 534, 556 P.2d 1137 (1976). We can only observe that many of the critical facts that bear upon resolution of the contested issues would likely have been addressed had the parties questioned witnesses. We appreciate a trial court's attempt to conserve judicial resources by acknowledging its understanding of the factual background and the parties' relative positions at the outset of a contested matter. But, this does not relieve the party bearing the burden of persuasion, here the state, from ensuring that the record contains adequate information for judicial decision-making at both the trial and appellate levels. *See State v. Rogers,* 186 Ariz. 508, 924 P.2d 1027 (1996) (stressing necessity of making factual record below in order for appellate court to decide fact-intensive issue and base holding on it).

¶ 15 Accordingly, the record before us does not support a finding that the police were attempting to initiate contact with Gant while he was in the vehicle either by confronting him or by signaling an intent to confront him, notwithstanding the officer's shining the flashlight. Therefore, the search of Gant's vehicle was outside the scope of *Belton. See Lewis,* 632 A.2d at 388 ("[A]ppellant had left the vehicle and [had] become a pedestrian before the police officer initiated contact with him; he was not an 'occupant' within the meaning of *Belton.*"). Because the narrow *Belton* exception is inapplicable, the search must satisfy the *Chimel* test to have been a lawful search incident to Gant's arrest. *See Strahan; see also Fafowora.* Because the passenger compartment of his vehicle was not " 'within his immediate control' " at the time of his arrest, *Chimel,* 395 U.S. at 763, 89 S.Ct. at 2040, 23 L.Ed.2d at 694, the search was not

conducted as an incident to his arrest. *Strahan; see also Fafowora.* Because the state failed to meet its burden of proving that the warrantless search of Gant's vehicle was a lawful search incident to his arrest, we must reverse the trial court's denial of his motion to suppress the evidence found in his vehicle unless the search can be justified by another exception to the Fourth Amendment's warrant requirement. *See Valle.*

Probable Cause

¶ 16 Because we can uphold a trial court's ruling on a motion to suppress if the court reached the correct result even though based on an incorrect reason, *State v. Nadler,* 129 Ariz. 19, 628 P.2d 56 (App.1981), we must consider the state's alternative argument that the police were justified in searching Gant's vehicle independent of the search-incident-to- arrest exception. The state asserts that, because Gant was present at a house where narcotics trafficking was suspected to be occurring and where the police had found a person with drug paraphernalia,[5] the police had probable cause to search Gant's vehicle under the automobile exception to the warrant requirement. *See State v. Weinstein,* 190 Ariz. 306, 947 P.2d 880 (App.1997) (police may search vehicle without warrant if vehicle readily mobile and if they have probable cause to believe it contains contraband). That exception, however, is inapplicable here.

¶ 17 The state has not cited any case, nor have we found any, in which the police were found to have probable cause to search a vehicle based on facts such as these. Based on the sparsely developed factual record before us on this issue, we must conclude that the police did not have probable cause to believe that Gant's vehicle contained contraband. Indeed, it would be inappropriate for us to do otherwise. *See Rogers.*

Conclusion

¶ 18 In sum, the state failed to meet its burden of proving the legality of the warrantless search of Gant's vehicle. *See Valle; Rodriguez.* Therefore, the trial court erred in denying Gant's motion to suppress the evidence found in his vehicle. Because of our resolution of this issue, we need not address Gant's remaining argument on appeal. We

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5. In its answering brief, the state cites additional facts that were not included in those summarized by the trial court at the hearing on Gant's suppression motion. Therefore, we do not consider them in our analysis. *See Sanchez.*

(continued...)

(...continued)

reverse Gant's convictions and sentences.

FLOREZ, J., concurs.

PELANDER, Judge, specially concurring.

¶ 19 I concur with the court's opinion but write separately to make several additional observations. Cases such as this are difficult and have produced disparate results around the country primarily because the law relating to warrantless vehicle searches after *Belton* has become so muddled. As Justice Lacy noted in her concurring opinion in *Glasco v. Commonwealth,* 257 Va. 433, 513 S.E.2d 137, 142 (1999) (Lacy, J., concurring):

> [N]othing in *Belton* specifically defined what circumstances qualified an arrestee as a "recent occupant." Consequently, from its inception, application of the so-called "bright line" *Belton* rule has not provided clear resolution of search issues in cases with facts that do not mirror the facts in *Belton* or the precise words of the rule.

¶ 20 The *Belton* rule was premised, at least theoretically, on concerns for officer safety and evidence preservation. *See New York v. Belton,* 453 U.S. 454, 457, 101 S.Ct. 2860, 2862, 69 L.Ed.2d 768, 773 (1981); *State v. Hanna,* 173 Ariz. 30, 32, 839 P.2d 450, 452 (App.1992). As routinely applied, however, the rule "may be invoked regardless of whether the arresting officer has an actual concern for safety or evidence." *United States v. McLaughlin,* 170 F.3d 889, 891 (9th Cir.1999). *See also Hanna; State v. Wanzek,* 598 N.W.2d 811 (N.D.1999); *Glasco.* As Judge Trott aptly noted in his concurring opinion in *McLaughlin:* "In our application of *Belton's* 'bright-line' [rule] . . . the rationales behind the search incident to arrest exception have been abandoned, the purpose has been lost, and, as Chief Justice Rehnquist predicted, little certainty remains." 170 F.3d at 894 (Trott, J., concurring).

¶ 21 "The purposes behind *Belton* were two-fold: to create a single familiar standard to guide police officers in automobile searches and to eliminate the need for litigation in every case to determine whether the passenger compartment of the vehicle is within the scope of a search incident to arrest." *Wanzek,* 598 N.W.2d at 815. *See also Belton,* 453 U.S. at 458-60, 101 S.Ct. at 2863-64, 69 L.Ed.2d at 774-75; *Glasco.* 513 S.E.2d at 141. Based on the varying results of cases decided in the twenty years following *Belton,* it is questionable whether those purposes have been achieved. And, I have some concerns that our ruling

today, although correct on the very sparse, undeveloped record before us, may frustrate those purposes and incorporate unintended nuances into this already complicated Fourth Amendment arena. As the state points out, the fine lines that courts may have to draw in this area are problematic:

> [W]ould a suspect who has one foot in the vehicle and one on the ground be deemed "in" or "out" for purposes of *Belton?* Would that depend on whether some part of his body was still touching the seat? What if he had both feet on the ground but the door is still open and he's leaning into the passenger compartment—or just reaching in? What if he's sitting on the tailgate of a station wagon but his feet are touching the ground—could he merely stand up to render *Belton* inapplicable? What if the suspect is standing outside the vehicle but has left the engine running? . . . [C]ould the initial contact [by police] be non-verbal, such as a signal by hand, whistle, or flashlight? Or, because an actual-occupancy concept necessarily depends on the suspect's precise physical location at the time of contact, would the initial contact have to involve at least the officer's present ability to make immediate physical contact? Under such a rule, given the endless variations in the facts that Fourth Amendment issues inevitably engender, suppression hearings on *Belton* searches could become extended mini-trials on factual minutiae, and the actions of police officers in the field would have no predictable legal consequences in the courtroom.

¶ 22 Regardless of whether those issues and concerns may be legitimate, this case does not raise any of them. Fourth Amendment determinations typically involve fact-intensive inquiries and, inevitably, line-drawing. And resolution of any such issues, of course, depends on analysis of specific facts actually presented in a particular case. Based on the record here, the state simply did not carry its burden of establishing the legality of the warrantless search of Gant's vehicle.

¶ 23 Nonetheless, I agree with the state's protest that "police should not have to run a footrace to implement *Belton.*" *See Wanzek,* 598 N.W.2d at 815 ("Police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of the vehicle in order to conduct a valid search."); *Thomas v. State,* 761 So.2d 1010, 1014 (Fla.1999) ("[T]he arrest and subsequent search should not be

invalidated merely because the defendant is outside the automobile. The occupants of a vehicle cannot avoid the consequences of *Belton* merely by stepping outside of the vehicle as the officers approach."). Indeed, our opinion expressly emphasizes that point. *See* ¶ 11, *supra.* I further note that we do not limit *Belton's* reach to cases in which police first initiate or attempt to initiate contact with the arrestee when he or she is in a *moving,* as opposed to a parked or otherwise stationary, vehicle.

¶ 24 Despite my concerns about the state of the law in this area, affirming the trial court's ruling here essentially would not only overlook, but also tacitly approve of the significant factual deficiencies in the record; minimize the state's burden of establishing the legality of this warrantless search; disregard the Supreme Court's cautionary note in *Belton* that it was "in no way alter[ing] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests," 453 U.S. at 460 n. 3, 101 S.Ct. at 2864 n. 3, 69 L.Ed.2d at 775 n. 3; and stretch the concept of "recent occupant" beyond *Belton's* intended, contextual meaning. *See Glasco,* 513 S.E.2d at 144 (Lacy, J., concurring) (noting that in all but one case cited in *Belton* on this point, "the arrestee was arrested while in the vehicle, and in all the cases the search of the vehicle occurred after the arrestees exited the vehicles at the direction of the police and while they were still within close proximity of the vehicles"). Accordingly, I concur that the trial court erred in denying Gant's motion to suppress.

APPENDIX B

Supreme Court

NOEL K. DESSAINT
CLERK OF COURT

STATE OF ARIZONA
402 Arizona State Courts Building.
1501 West Washington
Phoenix, Arizona 85007-3329

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

September 26, 2002

RE: STATE OF ARIZONA vs RODNEY JOSEPH GANT
Arizona Supreme Court No. CR-02-0164-PR
Court of Appeals Division Two No. 2 CA-CR 00-0430
Pima County Superior Court No. CR-20000042

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 24, 2002, in regard to the above-referenced cause:

ORDERED: The State of Arizona's Petition for Review by the Supreme Court = denied.

Record returned to the Court of Appeals, Division Two, Tucson, this 26th day of September, 2002.

Noel K. Dessaint, Clerk

TO:
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Thomas F Jacobs
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